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No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,
Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court below err in holding that the State must allow a private group to erect a large, unattended Latin cross directly in front of the Ohio Statehouse, on the ground that a private organization's display of a religious symbol in a public forum, even a public forum closely associated with the seat of government, can never violate the Establishment Clause?

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INTRODUCTION

Respondents' opposition to the certiorari petition is chiefly devoted to an unpersuasive attempt to recharacterize the single disputed legal issue in this case. It thus stands in contrast to the decisions below by the District Court and the Court of Appeals, both of which explicitly addressed and resolved the troubling question presented here between the conflicting dictates of the Establishment Clause and the Free Speech Clause. For purposes of this reply, however, it is most important first to underscore the significant areas of apparent agreement between the parties, before turning to address Respondents' attempted recharacterization of the central legal issue in this case.

I. THE QUESTION OF WHETHER PRIVATE RELIGIOUS DISPLAYS IN A PUBLIC FORUM CLOSELY ASSOCIATED WITH THE SEAT OF GOVERNMENT CAN EVER VIOLATE THE ESTABLISHMENT CLAUSE DIVIDES THE CIRCUITS AND REMAINS UNRESOLVED, AND THE COURT HAS PREVIOUSLY RECOGNIZED THAT IT IS WORTHY OF PLENARY REVIEW.

First, Respondents do not dispute -- for it is indisputable -- that a sharp split exists among the Federal Circuit Courts of Appeals on the sole issue presented in this case: whether an unattended religious display erected by a private group in a public forum closely associated with the seat of government can ever violate the Establishment Clause. On the one hand, the Sixth Circuit is aligned with the Eleventh Circuit and, to some extent, the Seventh Circuit in holding that such displays cannot violate the Establishment Clause. *See Pinette v. Capitol Square Review and Advisory Board*, 30 F.3d 676 (6th Cir. 1994); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc);

Americans United for Separation of Church & State v. Grand Rapids, 980 F.2d 1538 (6th Cir. 1993) (en banc); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc); *but cf. Gonzales v. North Township*, 4 F.3d 1412 (7th Cir. 1993). On the other hand, the Second and Fourth Circuits have held that such displays can and do violate the Establishment Clause. *See Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992); *Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990). *See* Pet. 18-24. The core positions of these courts are unaffected by the immaterial factual distinctions that Respondents have suggested in their opposition.[1] A writ of certiorari should issue here to consider and resolve this deep and persistent circuit conflict.[2]

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[1] At one point, Respondents suggest that this case may be distinct from *Kaplan* and *Smith* because here Petitioners have permitted other unattended displays in the public forum. Opp. 17-18. The same was true, however, of the public fora in *Kaplan*, 891 F.2d at 1033 (Meskill, J., dissenting), and in *Smith*, 895 F.2d at 955. Indeed, this is the very nature of any true public forum, which alone is where this issue has been posed. Moreover, in *Kaplan* the court expressly held that it is irrelevant for purposes of the Establishment Clause whether other religious symbols are or have been displayed in the public forum at issue, *see* 891 F.2d at 1029, a statement that occurs immediately following the language quoted by Respondents in their opposition.

[2] As detailed in the Petition for Certiorari, the specific circuit conflict identified here, and at issue in this case, did not surface again, in the wake of *McCreary*, until *after* the Court declined review in the two *Burlington* cases and the *Albemarle County* case. It was identified and exacerbated by the Sixth Circuit's pointed criticism of those decisions in *Americans United*, and has since been reinforced by the Eleventh Circuit's contrary decision in *Miller* and now the decision of the court below in this case. In none of these later cases, until this one, has review been sought from this Court. *See also* Pet. 23 n.7 (explaining why the

Second, Respondents do not question -- and there is no question -- that the Court has recognized that this issue remains an open one. The Court has recognized that the issue of whether an unattended religious display in a location closely associated with the seat of government could violate the Establishment Clause has not yet been resolved either by the "seasonal display" line of cases, such as *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), or by the "public access" line of cases, such as *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). *See County of Allegheny*, 492 U.S. at 600 n.50.[3] Moreover, Respondents do not deny that the issue has remained open since *County of Allegheny* and has not yet been settled, either expressly or implicitly, by the Court.

Third, Respondents do not, in any way, contest the rectitude of the Court's previous determination that this fundamental constitutional issue is of recurring significance and national importance, and thus constitutes "an important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10.1(c). The Court granted certiorari on this very issue in *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd mem.*, 471 U.S. 83 (1985). *See Board of Trustees v. McCreary*, 53 U.S.L.W. 3273 (U.S. 1984). In the end, however, the Court was unable to resolve the issue authoritatively because it was equally divided and

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Ninth Circuit's decision in *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994), did not pose the same conflict because there the court correctly distinguished *Kaplan* and *Smith* on their different facts).

[3] Indeed, as noted in the Petition for Certiorari, the Second Circuit in *Kaplan* has understood this Court's decision in *County of Allegheny* as lending further support for the position it has taken in square disagreement with the decision below in this case. *See* Pet. 20 n.5.

thus issued no decision on the merits. *See Board of Trustees v. McCreary*, 471 U.S. 83 (1985). *See also County of Allegheny*, 492 U.S. at 600 n.50. The instant case offers the Court an excellent opportunity cleanly to address and resolve this longstanding issue about the proper relationship between the conflicting dictates of the Establishment Clause and of the Free Speech Clause, in the particular context of unattended religious displays located in a public forum.

II. RESPONDENTS' CLAIM THAT THIS CASE SHOULD TURN ON ISSUES OF POLITICAL DISCRIMINATION REQUIRING RESOLUTION UNDER THE EQUAL PROTECTION CLAUSE IS A MISCHARACTERIZATION THAT DID NOT PROVIDE THE BASIS FOR DECISION IN ANY OF THE PROCEEDINGS BELOW.

In their opposition, Respondents have sought to recast this case as raising issues quite distinct from those expressly presented, considered, and resolved in any of the proceedings below. The administrative hearing examiner held: "relevant federal case law indicates that displays of menorahs and other symbols having both secular and sectarian significance during the holiday season do not run afoul of the Constitution, while displays of the Latin cross, which has a uniquely sectarian purpose, does violate the establishment clause." Pet. A36. The District Court disagreed with this determination and, relying on the *Americans United* decision, stated as its ground for decision that the application here came "from a private party to erect a religious symbol in what is a traditional public forum. In light of these facts, it is difficult to conclude that permitting this display would constitute government endorsement of religion" in violation of the Establishment Clause. Pet. A24. Similarly, the Court of Appeals expressly concluded that the very same points were determinative of this case: "Because Capitol Square is a

public forum and the Klan's display of a Latin cross is private speech, a reasonable observer could not perceive the display at issue to be a government endorsement of religion. Therefore, we hold that the display does not violate the Establishment Clause and we affirm." Pet. A2. In light of these plain holdings, Respondents' efforts to recast this matter instead as a political discrimination case are simply unavailing and unpersuasive.[4]

Respondents try to bolster their recharacterization of the legal issue in this case by arguing that their display of the Latin cross directly in front of the Ohio Statehouse carries political overtones in addition to the core religious message of the display. As an initial matter, this claim belies Respondents' own uncontroverted testimony of their purpose in seeking to erect this religious display as "a symbol for our Lord, Jesus Christ" in furtherance of their more general purpose to "establish a Christian government in America." Tr. of Dec. 20, 1993 Hearing at 101-02; *id.* at 53-55.

More generally, Petitioners do not dispute that the kinds of religious displays at issue in this case and the other cases cited above also carry political overtones. Indeed, it is obvious that the hotly contested issues raised in this country about the proper contours of the constitutional separation of church and state have always carried far-reaching political overtones. That is why they are addressed in a fundamental provision of our foundational political document -- the First Amendment to the United States

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[4] The sole passage in which any of the courts below even mentioned the Equal Protection Clause, in passing, was a quotation by the court below from this Court's decision in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), a labor-picketing case. That quotation, which appears in the court's peroration, did not provide the legal ground for decision in either the District Court or the Court of Appeals.

Constitution. But these observations do not change the single and central issue in this case, which is how to strike the proper constitutional balance between the Establishment Clause and the Free Speech Clause in judging the propriety of private religious displays located in a public forum.

Respondents also claim that this case is different because Petitioners have allowed a menorah to be displayed in front of the Ohio Statehouse for several years in conjunction with a Christmas tree. They completely ignore, however, the fact that this Court's square holding in *County of Allegheny* compels the State of Ohio to permit the display of a menorah in this setting, in part because the menorah has both religious and secular significance when it is displayed for the Chanukah holiday season. *See, e.g.*, 492 U.S. at 618 n.68; *see also id.* at 665 (Kennedy, J., concurring and dissenting). Yet several Justices in *County of Allegheny* expressed grave doubts about the propriety of any religious display of a cross -- which is not so associated with the holiday season -- in the very same setting. *See id.* at 629-30 (O'Connor, J., concurring); *id.* at 661 (Kennedy, J., concurring and dissenting).[5]

Respondents also fail to mention that they specifically amended their complaint to jettison their original request to have their display of the Latin cross included "as part of the 1993 holiday seasonal display on the Statehouse grounds" and instead sought to have their display erected on its own at

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[5] This is presumably because, as the Seventh Circuit has summarized: "we are masters of the obvious, and know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross." *Gonzales*, 4 F.3d at 1418; *see also American Civil Liberties Union v. St. Charles*, 794 F.2d 265, 271-72 (7th Cir.) (display of Latin cross "unmistakably signifies Christianity," "is not a traditional Christmas symbol," and is "not only religious but also sectarian") (Posner, J.), *cert. denied*, 479 U.S. 961 (1986).

that location. *Compare* Complaint at 1-2, 9 *with* Verified & Amended Complaint at 1-2, 9.[6] The ultimate point, however, is that the single issue for decision here is whether the government's sanction of Respondents' display of a large, unattended Latin cross directly in front of the Ohio Statehouse is required by the Free Speech Clause or would instead be in violation of the Establishment Clause. That is the issue properly presented to the Court on the decisions below in this case, rather than any repositioning of this case manufactured by Respondents in an evident attempt to evade review by this Court of the merits of those decisions.

Finally, Respondents contend that Petitioners here did not seek to associate themselves with Respondents' religious display. They thus implicitly point to an observation made by Justice Stevens in his earlier stay order in this case, where he noted that on the facts of this case the State may have "effectively disassociated itself from the display" by denying Respondents' application for permit and defending that denial in this litigation. Pet. A38-A39.

As an initial matter, it would make no sense to have cases like this one turn on whether the government has opposed an application for a display. In essence, then, the courts would be fashioning a test that would instruct the government that the more it opposed a particular display, the

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[6] Respondents also refer tangentially to a disclaimer sign that appeared with their religious display; they neglect to mention, however, that the purported "disclaimer" was a small cardboard sign that buckled immediately in the wind and was essentially indecipherable to any ordinary passerby. *See* Pet. App. A43 (photograph). *Cf. Gonzales*, 4 F.3d at 1423, 1414 (explanatory plaque that was obscured from view and later lost properly bears no weight in the analysis). Moreover, the Court has held that such a disclaimer is simply inadequate to immunize any truly or inherently religious display against an Establishment Clause challenge. *See, e.g., Stone v. Graham*, 449 U.S. 39, 41 (1980).

more likely it would be ultimately required to permit the display. Conversely, the more the government was willing to acquiesce in granting displays based on prior court rulings, the more likely it would be found to be obliged to prohibit the display if its actions were later challenged by any third party. Rather than presenting a workable approach to resolving such cases, therefore, any such emphasis would only encourage government officials to engage in conduct best described as self-defeating intransigence.

No finding of fact, however, was ever made on this point, and even more importantly, this point was never mentioned in the more sweeping decision rendered by the court below, and formed no part of its holding: "In a public forum, the religious content of private speech is absolutely irrelevant for First Amendment purposes." Pet. A12. As the Second Circuit has noted, the intractable problem posed by this approach is that under it, clearly, "the public forum doctrine would swallow up the Establishment Clause." *Kaplan*, 891 F.2d at 1029. A writ of certiorari is warranted in this case for the Court to consider whether any such categorical test is mandated by the conflicting dictates of the First Amendment.

III. THE "PUBLIC FORUM" ISSUE PRESENTED IN THIS CASE IS DISTINCT FROM THE ISSUE PRESENTED IN *ROSENBERGER V. RECTOR AND VISITORS OF UNIV. OF VA.* AND THUS THE COURT SHOULD DECIDE THIS CASE INDEPENDENTLY OF *ROSENBERGER*.

The Court granted certiorari on October 31, 1994 in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 18 F.3d 269 (4th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3346 (U.S. Nov. 1, 1994) (No. 94-329), to address a distinct issue also presenting a collision between the dictates of the

Establishment Clause and the Free Speech Clause. In *Rosenberger*, the specific issue is whether a public university may exclude a religious magazine from funding that is made available to various other publications. The Fourth Circuit held that the funding restriction did not violate the Free Speech and Free Press Clauses, in part because the university had a compelling state interest in avoiding a probable violation of the Establishment Clause. *Id.* The Fourth Circuit expressly noted, however, that the case did not involve any public forum issues. *See id.* at 287. Thus *Rosenberger* does not bear directly on the instant case, and should not be seen as either directly or indirectly resolving the issue presented herein.

Nonetheless, the instant case would serve as an appropriate companion case to *Rosenberger* for the Court to analyze some of the possible broader ramifications of the so-called "equal access" line of cases, such as *Widmar v. Vincent*, 454 U.S. 263 (1981).[7] The Fourth Circuit in *Rosenberger* distinguished *Widmar* on the ground that subsidizing a religious publication the same as other publications "inevitably would advance [the religious magazine's] Christian mission" and would "send an

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[7] Those ramifications are being felt in other significant areas as well. On the issue of school prayer, for example, the lower federal courts are citing the Court's "equal access" decisions to uphold ostensibly "voluntary" prayer in school settings, under the Free Speech Clause as pitted against the Establishment Clause, when such prayer is student-initiated and student-led. *See, e.g., Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1950 (1993); *Adler v. Duval County School Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994). *See also* Ronald Smothers, *School Prayer Gaining Ground in South*, N.Y. Times, Feb. 22, 1994, at A12 ("Measures moving through the legislatures in Mississippi, Florida, Louisiana, South Carolina, and Virginia take the approach that the issue is one of students' rights to free speech, rather than a question of religious rights.").

unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." *Rosenberger*, 18 F.3d at 286. Similarly, government sanction of a private group's desire to erect a large, unattended Latin cross directly in front of the Ohio Statehouse is properly distinguished from *Widmar* on the same basis: the State would be sending a signal of endorsement of a particular sectarian belief. Thus, the Court should reverse the ruling below and not require the State to be placed in a position that "emphasize[s] sincere and deeply felt differences among individuals." *County of Allegheny*, 492 U.S. at 651 (Stevens, J., concurring and dissenting).

CONCLUSION

For these reasons, as well as those set out at more length in the initial petition, a writ of certiorari should be granted in this case.

Respectfully submitted,

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